MOTION FILED DEC 15 1948

In the Supreme Court of the United States

OCTOBER TERM 1948.

No. 69.

J. H. ALLISON & COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

MOTION FOR LEAVE TO FILE PETITION TO RECONSIDER OUT OF TIME
and
PETITION TO RECONSIDER.

JOHN A. CHAMBLISS, JR.,
Provident Building,
Chattanooga, Tennessee,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 8847

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MOTION FOR LEAVE TO FILE PETITION TO RECONSIDER OUT OF TIME.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes J. H. Allison & Company through its counsel and moves the Court to allow it to file a motion to reconsider the action of the Court in denying petition for certiorari in this cause, despite the fact that the time for filing the petition had expired, this motion being based on the following grounds:

Counsel for petitioner, being inexperienced in practice before this Honorable Court, was under the impression that the old rules allowing twenty-five (25) days within which to file a petition to rehear were still in effect. The original of this petition was duly filed within the twenty-five day period, but counsel was at that time advised by the Clerk of the Court that the rules had been changed

and that the time limit was now fifteen (15) days and that the only way in which the petition could be filed would be on motion to file it out of time.

As pointed out in the petition to reconsider, this case involves questions of great moment and consequence which have never before been passed on by this Court. The law is left in an extremely muddled condition unless this Court consents to hear this case and to clarify the legal matters involved. Furthermore, unless counsel for the appellee can answer the question which is raised in the latter part of the petition, it is apparent that the case will have been decided on factual grounds *which did not exist*. This is plainly and flagrantly violative of the Wagner Act under which this suit was brought.

And I, John A. Chambliss, Jr., counsel for petitioner, do hereby certify that this motion and the petition to which it relates are presented in good faith and not for delay.

Respectfully submitted,

JOHN A. CHAMBLISS, JR.,

Counsel for J. H. Allison & Company.

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PETITION TO RECONSIDER.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, J. H. Allison & Company, files this its petition to reconsider, and respectfully shows the following:

I.

Heretofore, and on Monday, October 11, 1948, this Honorable Court entered its order denying this petitioner's petition for writ of certiorari to the Sixth Circuit Court of Appeals.

II.

Petitioner is aggrieved by the action of the Court and files this petition to reconsider within the time allowed by law and the rules of this Honorable Court, basing said petition upon the following grounds:

1. The matter involved in this cause is of great national importance and has never been passed upon by this Honorable Court.

2. There is such ambiguity and confusion in the opinion of the Sixth Circuit Court of Appeals (which automatically becomes the law of the case in the absence of the granting of a petition for certiorari by this Honorable Court) that neither the petitioner nor the National Labor Relations Board nor the general public can tell what the law is.

These two grounds will be discussed separately.

FIRST GROUND.

The matter involved in this cause is of great national importance and has never been passed upon by this Honorable Court. The whole system of free enterprise in the United States depends upon a proper preservation of individual rights.

It is quite true that as our society has become more industrial in nature, certain individual liberties have been subordinated to collective effort. As Elihu Root declared:

> "And in many directions the intervention of that organized control which we call government seems necessary to produce the same result of justice and right conduct which obtained through the attrition of individuals before the new conditions arose."

At the same time, it is the function of this Honorable Court to see that, except in so far as is necessary, the rights of individual conduct are preserved.

To deny an employer—as in the case at bar—the right to give individuals unsolicited pay increases—and to deny those employees the right to receive such increases—where there is no element of subverting the union or of modifying the basic contractual wage structure, plunges the poisoned dagger of collectivism into the heart of our system of economics.

We feel that the Court has not fully realized the tremendous national importance of the decision in this case. As indicative of its national importance—and for no other

purpose—we have assembled in our appendix to this brief some of the comments of the more important national publications. These are cited merely to show the urgency of having a clear-cut definition of the rights and liabilities in this case.

It is of the utmost importance that this Court assume jurisdiction, grant the petition, and settle the very basic questions presented.

SECOND GROUND.

There is such ambiguity and confusion in the opinion of the Sixth Circuit Court of Appeals (which automatically becomes the law of the case in the absence of the granting of a petition for certiorari by this Honorable Court) that neither the petitioner nor the National Labor Relations Board nor the general public can tell what the law is.

A careful reading of the majority opinion by the Sixth Circuit Court of Appeals in this case leads to such confusion as can only be remedied by a decision of this Court.

Briefly stated, the opinion of that Court points out that this company and its union had had collective bargaining agreements for some five years, and that this agreement called for a union shop—that is, all the employees belong to the union. During 1945 (when the dispute arose) the contract between the company and the union provided for a minimum wage scale, and there was no provision therein for merit increases. Some months after the execution of this contract, and in conformity with the practice that had obtained for many years, the company gave unsolicited increases to some of its employees, without bargaining relative thereto with either the employees or the union. Thereupon a union official requested that the company give the union a list of the names of the employees who had received these increases.

This request was refused, the company's vice-president pointing out that *under the existing contract* there was no

obligation to furnish such a list at such a time, i.e., in the middle of a contract year, and when no wages were being negotiated.

The opinion goes on to say that during the negotiations for the 1946 contract—which was negotiated subsequent to the filing of the charge, the issuance of the complaint, and the answer of the company—the union requested the company to include in the new contract a clause concerning the union's rights with respect to merit increases and other changes in wages, but that the company representatives stated that the company did not wish to include such a clause, and the union then "dropped its request."

The Court's opinion then stated that the Board had held that *the refusal of respondent during the formulation of the 1946 contract to negotiate with the union concerning merit wage increases and to furnish information upon the subject constituted a refusal to bargain.* (Thus it is quite apparent that the Board based its ruling exclusively upon what took place during the formulation of the 1946 contract.)

In spite of this, the Court goes on to say that "the union, as collective bargaining agent, may not be ignored by refusal of the employer to furnish information as to the basis of such increases, or the names of those receiving betterments in the wage scale and the amounts of the increased wages received by them."

It will be noted that the Court does not say that such refusal is illegal merely *during the formulation of a contract. The distinct impression is given that the company violated the Act in its refusal to furnish the list in May 1945.*

But this cannot be valid, *since that issue was not even before the Court, having been pretermitted by the Board!*

As conclusive evidence that such is so, we quote from the brief of the Board itself on the petition for certiorari to this Court, where on page 21 the following appears:

"Where the Board differed with the trial examiner was in its failure to rule as to whether the employer's refusal to bargain about merit increases and to inform the Union in respect thereto during the term of a contract dealing with wages but silent on the issues in dispute constituted an unfair labor practice. Whereas the trial examiner found that the assertion by the employer of its position as to merit increases on May 2, 1945, constituted a refusal to bargain (R. 24-25, 26), as did its subsequent assertions of this position on numerous occasions thereafter (R. 24-25, 26), including its assertions during the negotiations for the 1946 contract (R. 20, 24, 26), *the Board based its findings of a refusal to bargain only on the employer's assertion of its position during the negotiations for the 1946 contract and thereafter* (R. 34-35)."

Yet witness the confusion of interpretation shown in the Appendix!

And furthermore, observe that the notice now furnished the Company by the Board (and included in the Appendix) calls for (1) bargaining with the union as to merit increases *at any time* the Union requests; (2) furnishing a list of merit increases *at any time*, whether a contract is being negotiated or not; and (3) refraining from granting merit increases *at any time* without prior consultation with the Union. How can this be said to be compatible with the opinion of the Board?

There are two questions before this Court.

The first question—purely a question of law—is whether the company refused to bargain with the union during the formulation of the 1946 contract when, after one request by the union, it replied in the negative—and the request was then dropped.

The second question is whether there is any basis in law and fact for the statement by the Circuit Court of Appeals that "it should not be overlooked that, according to the record, the demand for the information (that is, the list of merit increases) was renewed later during the

negotiations for the 1946 contract." (Parenthesis ours.)

We respectfully submit that under all the rulings of this Court, the first question must be answered in the negative.

And, as to the second question which involves a mixture of fact and law, we respectfully ask counsel for the Board to **cite that place in the record where it appears that the request for the list of merit increases was made again during the formulation of the 1946 contract.**

If it is in the record—then this petition should be overruled.

If it is not in the record, then under the language of the Act itself, the Board's case is without legal or factual foundation, and this petition should be granted and a writ of certiorari issued to the Sixth Circuit Court of Appeals.

Respectfully submitted,

JOHN A. CHAMBLISS, JR.,

Counsel for Petitioner.

APPENDIX I.

From "Time," October 25, 1948.

GOVERNMENT.

Merit?

In thousands of U. S. firms, where union & management bargain out the workers' hour and wage scales, the boss each year rewards outstanding employees with independent merit raises above the scale. Last week the U. S. Supreme Court spiked the practice. Henceforth, said the court in effect, a company whose workers are covered by a union contract must, on demand, consult the union before giving merit raises.

The Supreme Court was sitting in judgment on a lawsuit involving Chattanooga's tiny J. H. Allison & Co. (meat packers). Until three years ago, Allison had considered it sound business practice to boost its best workers' pay above the general union scale. Then it ran up against some unexpected opposition. The company, said Local 402, Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. L., had no right to single out workers for special raises without consulting the union.

When the National Labor Relations Board upheld the union, Allison appealed to the courts. The lower courts upheld NLRB. By refusing to review the decision, the Supreme Court, in effect, approved NLRB doctrine that merit raises are not merely rewards for good work, but also changes in the pay scale, therefore subject to collective bargaining under the Wagner Act.

To many a businessman this looked like sawing one of the strongest props from under the incentive wage system. All businessmen know that merit raises are potent stimulants to good work, particularly in businesses where production cannot be measured by articles produced (e.g., on newspapers, on the stage and in offices). The decision

affected new as well as old employees. Labor experts now wondered whether an employer, for example, could still legally hire new help at more than the contract minimums unless the union was consulted.

Furthermore, it was plain to legal eagles that the ruling also affected non-union employees; under the Wagner and Taft-Hartley laws a union with a majority in the shop is the bargaining agent for all employees, whether they belong to the union or not. Said the New York Times: "The principle (established by the court) is a hazardous one in any kind of a free enterprise economy—free enterprise for the employee, as well as the employer. It takes from the resourceful employee * * * his chance individually to increase his earnings."

HERE'S QUESTIONS, ANSWERS GIVEN BY NLRB ON ALLISON MERIT RAISE CASE.

By James Marlow

Washington, Oct. 14 (AP). Can an employer grant a merit raise to an employe without consent of the union representing his workers?

There may be confusion over that question because of action on it by the U. S. Supreme Court this week.

This will explain what can and can't be done under Government law. The information here is from the National Labor Relations Board (NLRB).

To understand it, go back a bit.

A company in Tennessee (J. H. Allison & Co. of Chattanooga) had been signing a contract every year with a union of its employes. The contract covered rates of pay.

But the company—in addition to the regular, agreed-upon pay rate given all the employes—gave some of them higher pay in the form of merit raises.

In 1946, when it came time to bargain with the employer about a new contract, the union said: It wanted to bargain not only about the regular pay scale but also about any merit raises the employer might wish to give to some of the employes.

(The labor law says an employer must bargain with a union about wages. But it doesn't say anything about the kind of wages, whether regular rates of pay or merit raises.)

The company refused to bargain. It said the law covered regular rates of pay but did not cover merit raises. The union then complained to the NLRB that the employer was unfair.

(The NLRB is the Government agency which sees that the law is carried out and interprets the law when any question about its meaning arises.)

The NLRB said the boss was wrong. It said merit raises are wages and an employer must bargain about them. (The law doesn't say an employer must agree to what a union wants, when it bargains. But at least he must bargain about wages.)

In this case the company thought the NLRB was wrong and appealed to the U. S. Circuit Court of Appeals to overrule the NLRB. But the court upheld the NLRB.

The Company then took its last step and appealed to the U. S. Supreme Court to overrule the Circuit Court and the NLRB. This week the Supreme Court refused to review—or consider changing—the Circuit Court's ruling.

So the NLRB ruling stands now for all employers covered by the Federal labor law. To repeat, an employer must bargain on merit raises with the union representing his employes if the union wants to.

But at this point other questions arise. This is a roundup of questions and answers, with the answers given by the NLRB.

Q. Can an employer now continue to grant merit increases to his employes if he doesn't have anything about that in his union contract?

A. Yes. Unless an employer has a contract covering merit raises or unless the union wants to bargain about them, he can continue to grant merit increases.

(This is important to remember since some employers may think, because of the NLRB ruling in the case above that they no longer can grant merit increases under any circumstances.)

Q. But what of a case where an employer bargains with a union over merit raises and the bargaining breaks down? Can he then, with the bargaining suspended, go ahead and grant merit increases?

A. Yes, provided he doesn't do it to try to smash the union by winning workers away from it. Of course, if he did grant merit raises after bargaining broke down, the

union might complain to the NLRB that he was doing it to break the union.

Q. Suppose a union represents only a majority of the employes in a place, say, only 51 out of 100. Can an employer give the non-union workers merit raises?

A. Yes, just as he's free to give his union workers raises—provided he has no union contract covering merit raises. But once he signs such a contract, anything in that contract that applies to his union workers applies to his non-union workers too. Why?

Because when a union represents only a majority of workers in a plant, its bargaining covers all the employes, union and non-union alike.

Q. But suppose there's no contract covering merit raises and the boss hands out some. Can the union ask him for a list of those who got the merit raises?

A. Yes. The NLRB says the boss must supply such a list, even though he has done no bargaining and has no contract covering merit raises.

From "Business Week," October 16, 1948.

BARGAIN ON MERIT.

Supreme Court says employers can't give merit pay increases unless union OK's them, accepts other labor cases

"Merit raises" are a matter for collective bargaining—by law. Management cannot give a voluntary increase to individual employees without first taking it up with their union—unless the union contract gives the boss the right to do so.

•Allison Case—The U. S. Supreme Court made this clear in one of several decisions handed down this week. It rejected an appeal by J. H. Allison & Co., a Chattanooga meat packer, against a lower court order requiring that he bargain on merit increases.

In its appeal, the company argued that it is a management prerogative to give voluntary pay boosts to individual employees whenever they are justified. But the court upheld a National Labor Relations Board—and union—contention that wage increases of any kind must be taken up with the union.

•Union Prestige—Basis of the decision: Granting wage increases to some favored employees, and not to others, might undermine the prestige and plant status of a union.

The Allison case was based on provisions of the old National Labor Relations Act; the new Labor-Management Relations (Taft-Hartley) Act did not amend the sections of law involved.

From "Newsweek," October 25, 1948.

COURT:

Ceiling on Merit

Many a person was startled last week to find an employer could no longer give his employees merit raises without bargaining with the union—that is, if the union wanted to be consulted. The Supreme Court seemed to imply as much, not by rendering a decision, but merely by the choice of cases it chose to review.

In the case of J. H. Allison & Co., Tennessee meat packers, the National Labor Relations Board had ruled the company guilty of unfair labor practices for refusing to negotiate with the union on merit pay raises. The Cincinnati Circuit Court upheld the NLRB. The Supreme Court refused to review the case.

Simultaneously the Supreme Court announced it would hear a case involving the Crompton-Highland Mills, Inc., of Griffin, Ga. The company had broken off negotiations with the union, then twelve days later raised wages without further consultation. The NLRB held the company guilty of refusing to bargain collectively, but the New Orleans Circuit Court had overruled it. The NLRB appealed to the Supreme Court to bring the New Orleans court into line.

To many the implication was that the Supreme Court believes that the union must be consulted, if it wishes, on any kind of pay raise, merit or otherwise. "The implications of the decision go to the very heart of a cherished American tradition," said The New York Herald Tribune, "the right of the individual to advance himself by his own efforts."

"The principle is a hazardous one in any kind of free-enterprise economy—free enterprise for the employe as well as the employer," commented The New York Times.

Actually, their concern was untimely: the body was already cold. Under Section 8 (5) of the Wagner Act, it is unfair labor practice for an employer to "refuse to bar-

gain collectively." Although no case has yet been brought under the Taft-Hartley Act, the same section was carried into it without change. And there is plenty of Supreme Court precedent for insisting that all sorts of wage increases are proper subjects for collective bargaining, notably the United Auto Workers-J. I. Case Co. decision (1944) and another involving the Brotherhood of Railroad Telegraphers. There is no obligation for the employer to follow union wishes, but if the union so desires, he must negotiate.

From "New York Times," Wednesday, October 13, 1948.
Editorial, page 24.

"MERIT PAY" INCREASES.

The United States Supreme Court has refused to review a lower court's decision that under the National Labor Relations (Wagner) Act an employer having a contract with the union must not grant pay increases for merit without bargaining first with the union having jurisdiction over the benefited employe. In a separate case on which the Court acted on Monday it agreed to review a decision by another Circuit Court of Appeals that a textile mill did not violate the Wagner Act by increasing wages without notifying officials of the union with whom it had been unable to negotiate an increase.

In both these cases, different though they are in details, the National Labor Relations Board has said in effect that gratuitous pay increases were subject to collective bargaining. And now the highest court in the land has decided to let stand (in effect, upholding) such a finding in the "merit pay" case, and has promised the Board to inquire into the Appellate Court's overruling of the principle in the case.

The principle is a hazardous one in any kind of a free-enterprise economy—free enterprise for the employe as well as the employer. It takes from an employer his right to reward a superior worker with premium pay, to manage his own payroll. It takes from the resourceful employe, whether union member or not, his chance individually to increase his earnings while on his chosen job. This right is not to be confused with the basic and well-recognized right of unions to work for and write into contracts minimum wages for their members. These negotiated rates, because of the great numbers of workers covered, are necessarily filed on a pro rata basis and in terms of medial or average work. They should not preclude individual bargaining where worth, and not favoritism, warrant extra pay.

A National Labor Relations Board spokesman was quoted as saying after the Court's session Monday that the Taft-Hartley Labor Law might make a difference in respect to the policy that all increases are negotiable where there are union contracts. He suggested that a new case would have to be brought under the new labor law to determine whether the principle was applicable only under the old (Wagner) law. By all means, let such a test case be brought soon.

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL bargain collectively upon request with Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 402, affiliated with the American Federation of Labor, as the exclusive representative of all the employees in the bargaining unit described herein with respect to merit wage increases;

WE WILL, upon request, furnish to the above-named union, full information with respect to merit wage increases, including the number of such increases, the amounts of the increases, and the standards employed in arriving at such increases; and

WE WILL refrain from granting merit wage increases without prior consultation with the Union.

The bargaining unit is: all production workers, including truck drivers and drivers' helpers, exclusive of clerical employees, salesmen, guards, and supervisory employees.

J. H. ALLISON & COMPANY
(Employer)

Dated..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

(Seal)

Certificate of Counsel.

I, JOHN A. CHAMBLISS, JR., counsel for petitioner, do hereby certify that this motion and the petition to which it relates are presented in good faith and not for purposes of delay.

JOHN A. CHAMBLISS, JR.